

FILED  
UNITED STATES DISTRICT COURT CLERKS OFFICE  
FOR THE DISTRICT OF MASSACHUSETTS

2004 MAY 26 P 2: 12

BABCOCK BORSIG POWER GmbH,	)	
	)	U.S. DISTRICT COURT
	)	DISTRICT OF MASS.
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 04-10825 (RWZ)
BABCOCK POWER, INC.,	)	
	)	
Defendant.	)	

**BABCOCK POWER, INC.'S MOTION TO DISMISS THE COMPLAINT**

Pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(7) and the inherent power of the Court, defendant Babcock Power, Inc. ("Babcock Power") moves to dismiss the complaint as against it. As grounds for this motion, Babcock Power states:

1. That plaintiff's complaint seeks relief on behalf of entities that that are not before this Court, thus preventing this Court from being able to completely adjudicate the instant dispute.
2. That the absence of these parties will also prejudice the rights of those same absent parties.
3. That the complaint also should be dismissed under the first filed rule, as Babcock Power has brought claims against plaintiff Babcock Borsig Power GmbH ("BBP") -- and all necessary parties affiliated with BBP -- in an action based largely on the same underlying actions and occurrences, and which was filed nearly six months ago in the Business Litigation Session of the Massachusetts Superior Court, captioned Babcock Power, Inc. v. Babcock Borsig Power GmbH, et. al., No. 03-5334-BLS (Mass. Super. Ct.).

In support of this motion, Babcock Power relies on its Memorandum of Law and the Affidavit of Steven J. Comen submitted herewith.

WHEREFORE, Babcock Power respectfully requests that the Court (i) grant this motion, (ii) dismiss the complaint, and (iii) grant any other relief the Court may deem appropriate.

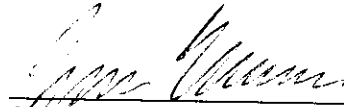
**REQUEST FOR ORAL ARGUMENT**

Pursuant to Local Rule 7.1(D), Babcock Power hereby requests oral argument on this Motion to Dismiss.

Respectfully submitted,

BABCOCK POWER, INC.

By its attorneys,

  
\_\_\_\_\_  
Steven J. Comen (BBO# 093320)  
James O. Fleckner (BBO# 641494)  
GOODWIN PROCTER LLP  
Exchange Place  
Boston, Massachusetts 02109  
617-570-1000

DATED: May 26, 2004

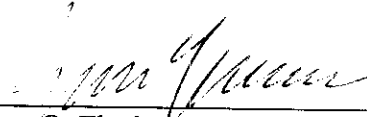
**LOCAL RULE 7.1 CERTIFICATION**

I hereby certify that, on May 26, 2004, I conferred with plaintiff's counsel and attempted in good faith to resolve or narrow the issues raised in this motion but was unable to do so.

  
\_\_\_\_\_  
Steven J. Comen

### **CERTIFICATE OF SERVICE**

I hereby certify that true copies of Babcock Power, Inc.'s Motion To Dismiss The Complaint, the Memorandum of Law and Affidavit of Steven J. Comen in support thereof were served upon the attorney of record for plaintiff, Kenneth M. Bello, c/o Bello Black LLP, 535 Boylston Street, Boston MA 02116, by hand, on May 26, 2004.

  
\_\_\_\_\_  
James O. Fleckner

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